Supreme Court, U.S.
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No. 01-994

In The

Supreme Court of the United States

WYOMING OUTFITTERS ASSOCIATION, JIM ALLEN, TIM TREFREN, JOHN WINTER, BOBBI WADE, VINCE VAN ROEGEN, KIM R. CARRARA, WALTER LEE JONES, CRAIG ARTMAN, and ERIC LARSEN,

Petitioners,

v.

WYOMING GAME AND FISH COMMISSION, HAL CORBETT, LES HENDERSON, TRACY HUNT, L. GARY LUNDVALL, J. MICHAEL POWERS, MIKE MUNZIE, DAVE STEGER, and JOHN BAUGHMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Tenth Circuit (Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1a-5a) affirming the order of the United States District Court for the District of Wyoming denying Petitioners' motion for an extension of time, is reported at 2001 WL 1176390 (10th Cir. (Wyo.) Oct. 5, 2001). The order of the United States District Court for the District of Wyoming denying Petitioners' motion for an extension of time (Pet. App. at 6a-12a), is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered October 5, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On June 16, 1998, Petitioners brought suit in United States District Court for the District of Wyoming, claiming that Respondents' regulations allocating hunting licenses between residents and nonresidents violated the Equal Protection Clause and the Dormant Commerce Clause.

The District Court entered judgment against Petitioners on July 5, 2000, granting Respondents' Motions for Summary Judgment and to Dismiss. The District

Court held that two categories of Petitioners, the Wyoming Outfitters Association and the individual outfitters, did not have standing. These Petitioners were unable to show injury in fact because they are not subject to differential categorization or treatment in the allocation of licenses which they neither purchase nor sell. The District Court further held that, although the nonresident hunter category of Petitioners did have standing, their claims failed to state a claim as a matter of law. In addition, the District Court held that nonresident hunters were not a suspect class, hunting was not a fundamental right, and the Respondents' regulations were rationally related to a legitimate state interest. The decision that the District Court entered on July 5, 2000, is not the subject of Petitioners' Writ.

Pursuant to FED. R. APP. P. 4(a)(1), Petitioners had until August 5, 2000, to appeal the July 5, 2000, final Order of the District Court. Petitioners had filed no notice of appeal by August 5, 2000, nor had Petitioners contacted Respondents suggesting a need for extension of time.

More than two weeks later, on August 22, 2000, Petitioners filed a Motion for Extension of Time in Which to File Appeal, as well as the Notice of Appeal in question. Respondents filed an Opposition to the Motion for Extension of Time on September 1, 2000, and a hearing was held before the United States District Court for the District of Wyoming on September 12, 2000.

Petitioners' Motion for Extension of Time was initially filed without supporting documentation. Petitioners' Motion alleged that the motion was made

necessary because of the complexity of the issues, the large number of party plaintiffs, the difficulty in locating party plaintiffs, the heavy schedule of counsel, and counsel's delay in receiving the judgment. More than two weeks later, after Respondents opposed the Motion for Extension of Time, counsel for Petitioners filed into the official record of the case an affidavit chronicling the various factors Petitioners now claim were not considered by the District Court or the Tenth Circuit Court of Appeals.

On September 18, 2000, the District Court denied Petitioners' Motion for Extension of Time in Which to File an Appeal because the Petitioners failed to make a showing of "excusable neglect" as required under FED. R. APP. P. 4(a)(5). Pet. App. at 6a-12a.

The Tenth Circuit Court of Appeals affirmed the District Court's denial of the Motion for Extension of Time on October 5, 2001. After carefully reviewing the record, the Tenth Circuit concluded that the District Court did not abuse its discretion in denying Petitioners' Motion for Extension of Time. Pet. App. at 1a-5a.

ARGUMENT

1. The Tenth Circuit Court of Appeals Applied the Appropriate Standard of Review

The trial judge is in the best position to assess the equities of the circumstances relating to a motion for an extension of time to file an appeal. *Parke-Chapley Const. Co. v. Cherrington*, 865 F.2d 907, 912 (7th Cir. 1989). The

rule on granting such motions therefore uses the permissive term "may," rather than the mandatory term "shall": "[t]he district court *may* extend the time to file a notice of appeal if . . . that party shows excusable neglect . . . " FED. R. APP. P. 4(a)(5) (emphasis supplied).

Thus, the decision to grant such a motion is committed to the discretion of the trial court and is therefore discretionary with the trial court. *Parke-Chapley*, 865 F.2d at 912. Accordingly, courts of appeal defer to the trial court's decision on such a motion absent an abuse of that court's discretion. *Graphic Communications International Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 3-4 (1st Cir. 2001), *citing Pontarelli v. Stone*, 930 F.2d 104, 109 (1st Cir. 1991); *Parke-Chapley*, 865 F.2d at 911, *citing Files v. City of Rockford*, 440 F.2d 811, 816 (7th Cir. 1971); Federal Procedure, *Appeal, Certiorari, and Review* (Lawyers Cooperative Publishing: 1994), § 3:547, pp. 236-237, n.26 and cases cited therein.

The standard of review of a court's denial of such a motion is therefore that of the abuse of discretion, rather than error. *In re O.P.M. Leasing Services Inc.*, 769 F.2d 911, 915 (2nd Cir. 1985). Accordingly, the mere fact that an appellate court would have weighed the evidence differently had it been the trier of fact is insufficient to warrant reversing the district court's denial.

Because the trial court is therefore accorded wide discretion in deciding that neglect is not excusable in a particular case, appellate courts will not meddle with those decisions unless some exceptional justification exists. *Quebecor*, 270 F.3d at 6-7. Thus, an appellant must

convince the appellate court of a definite and firm conviction that there was a clear error in judgment by the trial court. *In re O.P.M.*, 769 F.2d at 915.

If the standard of review were not whether the court abused its discretion by ruling in a manner that was unreasonable, every litigant whose motion to file a late notice of appeal failed would appeal the denial of his motion, and the courts of appeals would be flooded with appeals of entirely reasonable decisions in the hope of winning a second bite at the same apple. Such a regime could hardly be characterized as one in which the decision on whether the neglect was excusable was committed to the discretion of the trial court. Such a regime was therefore never the intention of the framers of the Rules.

For these reasons, a trial court has not abused its discretion if a reasonable person could agree with the trial court's decision. *See* Federal Procedure, *Appeal, Certiorari, and Review* (Lawyers Cooperative Publishing: 1994), § 3:547, pp. 236-237, *citing Ooely v. Schwitzer Div., Household Mfg., Inc.*, 961 F.2d 1293 (7th Cir. 1992), *cert. denied*, 506 U.S. 872 (1992) (court abuses its discretion in ruling on motion for extension to file notice of appeal if no reasonable person could agree with the court's decision).

The rule on late filing of notices of appeal requires a showing of excusable neglect or good cause: "[t]he district court may extend the time to file a notice of appeal *if* . . . that party shows excusable neglect or good cause." FED. R. APP. P. 4(a)(5) (emphasis supplied). The mere assertion that the denial of the extension was somehow unfair or created some undefined injustice is therefore

insufficient to warrant reversal of a district court's denial of an extension. *U.S. v. Atkinson*, 748 F.2d 659, 661 (Fed. Cir. 1984). Similarly, a court does not abuse it discretion by denying a motion for an extension of time for filing a notice of appeal where there are no unique or extraordinary circumstances. *Quebecor*, 270 F.3d at 6.

Moreover, the burden of proving "excusable neglect" in the trial court lies with the movant. The text of the rule itself authorizes the district court to extend the time to file a notice of appeal on the grounds of excusable neglect only if the party seeking the extension *shows* excusable neglect. FED. R. APP. P. 4(a)(5)(A)(ii). Where the movant has simply failed to meet that burden, a court's denial of its motion cannot be an abuse of its discretion.

In the case at bar, the District Court considered the detailed and lengthy pleadings submitted by Petitioners before ruling on their Motion for Extension of Time to file a late notice of appeal. *See* Pet. App. at 7a, n.1. These pleadings included numerous allegations of fact concerning how counsel's legal practice, medical condition, and relationship with his clients excused the failure to timely file a notice of appeal. In addition, the District Court heard oral argument from counsel for all parties regarding these allegations. Because the District Court is a trial court, i.e., a court specifically designed for the trying of facts and before which the facts are actually tried, it could best assess the equities of the circumstances relating to the motions. *Parke-Chapley*, 865 F.2d at 912.

As noted by the Tenth Circuit Court, the fact that counsel was able to perform various duties related to his extensive pro bono practice indicated that he was not so

physically or mentally disabled that he could not file a simple notice of appeal. Pet. App. at 4a. Further, the form for a notice of appeal consists of a caption, signature block, and a single sentence of text. *See* Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure. As to counsel's inability to communicate with clients, that was entirely the product of the Petitioners' choice to make themselves unavailable to their own attorney. For all these reasons, it was entirely reasonable for the District Court to find that the circumstances failed to excuse counsel's failure to timely file a notice of appeal.

Because the District Court's decision was entirely reasonable, the Tenth Circuit Court of Appeals could not have reached a definite and firm conviction that there was a clear error in judgment by the trial court. The District Court therefore cannot be said to have abused its discretion. *In re O.P.M.*, 769 F.2d at 915.

At the very least, the District Court's decision cannot be considered unreasonable. Accordingly, reversal of that decision was precluded by the fact that the rules themselves commit such decisions to the discretion of the trial court. *See* FED. R. APP. P. 4(a)(5) ("may" rather than "shall"); *Parke-Chapley*, 865 F.2d at 912 (decision committed to the discretion of the trial court). The Tenth Circuit Court of Appeals therefore did not err in affirming the District Court's decision. In conclusion, the decision on Petitioners' motion was committed by law to the discretion of the trial court and the court's exercise of that discretion was in fact thoroughly and well reasoned. Accordingly, the District Court did not abuse its discretion in declining to grant Petitioners' motion to file a late notice of appeal. FED. R. APP. P. 4(a)(5). Because the Tenth

Circuit Court of Appeals affirmance thus was correct, this Court should deny Petitioners' petition for certiorari.

2. There is No Compelling Reason for This Court to Grant Petitioners' Writ of Certiorari

SUP. CT. R. 10 provides considerations governing when this Court will grant review on a petition for certiorari. While this Court's discretion to grant certiorari is unquestionably broad, the Rule states that a "petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. The Rule further describes several situations which this Court might consider warranting the granting of certiorari.

Petitioners in this case have not stated a compelling reason for this Court to grant certiorari. Despite Petitioners' attempts to mutate the facts of this case, the District Court and Court of Appeals decisions do not conflict with previous decisions of this Court, and the District Court and Court of Appeals decisions do not in any way conflict with decisions of other courts of appeals. Petitioners suggest that the District Court and the Court of Appeals used an inappropriate legal standard when considering the issues before them. However, the Petitioner goes on to claim that the correct legal standard is the one set forth in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). To the contrary, that decision is thoroughly described and applied in both the District Court and the Court of Appeals decisions. Rather than bringing a compelling controversy before this Court, Petitioners, unhappy with the factual findings of the District Court and Court of

Appeals, ask this Supreme Court of the United States of America to once again reconsider the factual findings and reapply the properly stated rule of law to those findings. Because this Court is one of review and law, Petitioners have failed to state a compelling reason for this Court to grant certiorari.

A. The District Court and Court of Appeals Did Not Decide an Important Federal Question in a Way That Conflicts with Relevant Decisions of this Court.

Petitioners' initial claims before the Federal District Court for the District of Wyoming were dismissed or summarily disposed of on July 5, 2000. Petitioners had until August 5, 2000 to appeal that decision. FED. R. APP. P. 4(a)(1). Instead, Petitioners, on August 22, 2000, filed a Motion for Extension of Time in Which to File an Appeal. Pursuant to FED. R. APP. P. 4(a)(5), the District Court could extend the time for filing an appeal if Petitioners could demonstrate "excusable neglect" in filing late.

When considering whether to extend the time for filing an appeal, a court must consider that the prevailing party needs to know at some fixed time how the litigation stands. *In re O.P.M.*, 769 F.2d at 916; *In re Orbitec Corp.*, 520 F.2d 358, 362 (2nd Cir. 1975); *C-Thru Products, Inc. v. Uniflex, Inc.*, 397 F.2d 952, 955 (2nd Cir. 1968); *Fase v. Seafarers Welfare and Pension Plan*, 574 F.2d 72, 75 (2nd Cir. 1978).

Thus, the Advisory Committee on Appellate Rules has noted that the timely filing of a notice of appeal "is of the utmost importance." Advisory Committee Notes to

the 1967 Adoption of FED. R. APP. P. 3. Accordingly, the timely filing of a notice of appeal is both mandatory and jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Houston v. Lack*, 487 U.S. 266 (1988); *Browder v. Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978), *rehearing denied*, 434 U.S. 1089 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960).

For these reasons, "[t]he power of the federal courts to extend the time limits on the invocation of appellate jurisdiction is severely circumscribed." *Goode v. Winkler*, 252 F.3d 242, 245 (2nd Cir. 2001), *quoting Mendes Junior International Co. v. Banco Do Brasil, S.A.*, 215 F.3d 306, 312 (2nd Cir. 2000).

Indeed, the Federal Rules of Appellate Procedure generally require that a notice of appeal be filed within 30 days after the judgment or order appealed from is entered. FED. R. APP. P. 4(a)(1)(B). However, those rules also provide that the district court may extend the time to file such a notice if a party so moves no later than 30 days after the time prescribed by this rule expires and shows "excusable neglect." FED. R. APP. P. 4(a)(5)(A).

If ordinary neglect were excusable, it would be hard to conceive of what neglect would not be excusable. *Lowry v. McDonnell Douglas Corporation*, 211 F.3d 457, 464 (8th Cir. 2000); *In re O.P.M.*, 769 F.2d at 917. Accordingly, if a mere mistake by counsel sufficed, the requirement of excusable neglect would be meaningless. *In re O.P.M.*, 769 F.2d at 918, *citing Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976), *cert. denied*, 429 U.S. 886

(1976), *rehearing denied*, 429 U.S. 988 (1976). Mere "garden-variety" attorney inattention therefore cannot be excusable. *Lowry*, 211 F.3d at 464.

In order, therefore, to meet the standard of "excusable neglect", the circumstances relating to the neglect must be unique or extraordinary. *Quebecor*, 270 F.3d at 6-8; *Pontarelli*, 930 F.2d at 111; *State of Oregon v. Champion International Corporation*, 680 F.2d 1300, 1301 (9th Cir. 1982); *Maryland Casualty Co. v. Conner*, 382 F.2d 13, 17 (10th Cir. 1967); *accord*, *Parke-Chapley*, 865 F.2d at 911 ("unusual").

The very purpose of achieving finality that lies behind both the rule requiring timely appeal, and the rule allowing extensions of time to appeal for neglect only upon a showing that the neglect is excusable, would be undermined if ordinary neglect sufficed to excuse the failure to timely file an appeal. *Allied Steel, General Contractor v. City of Abilene*, 909 F.3d 139, 143 (5th Cir. 1990); *Champion*, 680 F.2d at 1301.

If ordinary neglect sufficed to excuse the failure to timely file an appeal, the 30-day period for appeal provided in Federal Rule of Appellate Procedure 4(a) would be converted into a 60-day one – a result the rule's framers clearly did not intend. *Pontarelli*, 930 F.2d at 111; *Allied Steel*, 909 F.2d at 142-143; *In re O.P.M.*, 769 F.2d at 917. Such a construction would simply eviscerate the rule that a party must appeal within thirty days.

As a member of the Advisory Committee that drafted the rule has explained, "[w]e did not want lawyers to be taking advantage of this extra 30 days as a matter of course; it is not meant to cover the usual excuse that the

lawyer is too busy, which can be used, perhaps truthfully, in almost every fact. . . . It is hoped that the courts give effect to this . . . standard in the spirit in which it was written – that is, to take care of emergency situations only." STERN, ROBERT, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 298-299 (1967), *quoted at* 16A WRIGHT & MILLER, *Federal Practice and Procedure, Jurisdiction and Related Matters*, § 3950.3, p. 153, n.22.

Ordinary neglect therefore does not suffice to meet the standard of excusable neglect. *Allied Steel*, 909 F.2d at 142; *In re O.P.M.*, 769 F.2d at 916; *Champion*, 680 F.2d at 1301; *Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir. 1979), *citing* STERN, *Changes in the Federal Appellate Rules*, 41 F.R.D. at 298-299; *Selph v. Council of City of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979); 16A WRIGHT & MILLER, *Federal Practice and Procedure, Jurisdiction and Related Matters*, § 3950.3, p. 153, n.22, *quoting* STERN, *Changes in the Federal Appellate Rules*, 41 F.R.D. at 298-299.

The federal rules provide practitioners a form for a notice of appeal and it consists of a caption, signature block, and a *single sentence of text*. *See* Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure. The ease with which a notice of appeal may thereby be perfected warrants construing the rules permitting late filing of such notices narrowly.

The District Court, in considering Petitioners' Motion for Extension of Time, held that the proper standard for considering whether "excusable neglect" has been demonstrated is the standard set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380

(1993). *See Stutson v. United States*, 516 U.S. 193, 195 (1996); *City of Chanute, Kansas v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994) (holding that *Pioneer* analysis of what constitutes "excusable neglect" in the bankruptcy context is the same analysis which should be applied when considering motions for extension of time under FED. R. APP. P. 4(a)(5)). The District Court further stated that the standard should be a somewhat flexible standard. Pet. App. at 9a.

The circumstances *Pioneer* found relevant to the excusable neglect determination include the circumstances surrounding the omission, the danger of prejudice to the other parties, the length of the delay, the reason for the delay, and the good faith of the party seeking relief. *Pioneer*, 507 U.S. at 395. Accordingly, this Court noted that the excusable neglect standard was "flexible" and "somewhat elastic." *Id.* at 392.

However, this Court also noted that the requirements in the federal rules that the neglect be excusable was needed in order to deter parties from freely ignoring court-ordered deadlines. *Id.* at 395. This Court therefore rejected the notion that the analysis should focus on whether the party seeking to file late reasonably policed their attorney, rather than on whether the attorney did all he reasonably could to comply with the deadline. *Id.* at 396-398.

This Court therefore affirmed that inadvertence, ignorance of the rules, or mistakes constituting the rules do not constitute excusable neglect absent unusual circumstances. *Id.* at 392. Further, this Court found that the fact that counsel was experiencing upheaval in his law

practice at the time of the deadline in question was not entitled to much weight. *Id.* at 398.

Accordingly, even after the *Pioneer* decision, courts of appeals have overturned the granting of motions for extensions to file late appeals where there was simply "garden-variety attorney inattention" rather than unique and unusual circumstances. *See, e.g., Lowry,* 211 F.3d at 463-464. Similarly, even after the *Pioneer* decision, courts of appeals have affirmed denials of motions for extensions of time to file late appeals because of the absence of unique or extraordinary circumstances. *See, e.g., Quebecor,* 270 F.3d at 6.

While this Court's decision in *Pioneer* suggests that excusable neglect is more "forgiving" than certain lower court authority preceding it had held, there still must be a satisfactory explanation for the late filing in order for a motion to permit it is to be granted. *Quebecor,* 270 F.3d at 5. An explanation that does not demonstrate that the circumstances relating to the neglect were unique or extraordinary is not satisfactory. *Id.*

Moreover, while *Pioneer* enunciated a number of different factors relevant to the determination of whether neglect is excusable, the *reason for missing the deadline* remains both critical and key in the analysis. *Quebecor,* 270 F.3d at 5; *Lowry,* 211 F.3d at 463. In addition to its own central importance, this factor may also affect others. For example, the fact that such reason is inconsistent and shifting suggests that the party making those excuses might not be acting in good faith. *Lowry,* 211 F.3d at 463.

If unique or exceptional circumstances were not required for neglect to be excusable, mere ordinary

neglect would suffice, the requirement that the neglect be excusable eviscerated, the district courts would be flooded with motions to file late notices of appeal, and the requirement that notices be filed within thirty days would be rendered unenforceable.

Rather than conflicting with this Court's *Pioneer* opinion, the District Court in the case at bar applied the legal analysis set forth in *Pioneer*. The District Court not only recognized that *Pioneer* was the controlling authority, the District Court accurately set forth the four guideposts from that decision. Pet. App. at 9a-10a.

Petitioners' assertion that the District Court's or the Tenth Circuit Court's decisions applied a "different, inflexible 'excusable neglect' test or standard" is belied by the plain text of the opinions. The District Court expressly enumerated and applied the four factors enunciated in *Pioneer*. Pet. App. at 9a-12a. In fact, the court noted that this was a "lesser" standard than earlier law had provided in construing FED. R. APP. P. 4(a)(5). The Tenth Circuit, after again enumerating and expressly applying the four factors set forth in *Pioneer*, found "nothing to suggest that the district court abused its discretion." Pet. App. at 3a-4a. Both courts properly stated and applied the exact "excusable neglect" test set forth in *Pioneer*, and therefore neither decision conflicts with the law of that case.

The four factors for a court to consider when determining whether neglect in filing a motion for extension of time is excusable are: danger of prejudice; length of delay and its potential impact on judicial proceedings; reason for delay including whether it was within the reasonable

control of the movant; and whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395. A court must consider these factors taking into account all of the relevant circumstances surrounding the party's omission. *Id.*

The District Court properly considered each of these circumstances in finding that Petitioners did not show "excusable neglect". As to three of the factors, the District Court agreed that the delay in judicial proceedings would result in prejudice to Respondents,[1] but the court reviewed the evidence and found that the length of the delay would not have a problematic impact on judicial proceedings, and that it appeared that the attorney for Petitioners acted in good faith. Given these factors, the District Court, upon review of all the available evidence, still held that Petitioners had not established "excusable neglect" in failing to meet the thirty-day filing requirement.

The District Court held that the fourth *Pioneer* factor, the reason for delay and whether it was within the reasonable control of the movant, was the controlling factor

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[1] The purpose of the thirty-day time period set forth in FED. R. APP. P. 4(a) is to provide finality to court proceedings. "Requiring courts constantly to adjudicate claims of extraordinary or unique circumstances would defeat the purpose of the time limitation in Rule 4(a)(1) – to provide a definite point at which, in the absence of a notice of appeal, litigation will cease. Rule 4(a)(5) clearly indicates that the potential appellants may not regard the period during which a District Court may extend the time for filing a notice of appeal as a further period in which to ponder their options." *Allied Steel*, 909 F.2d at 143.

in its decision. The Tenth Circuit Court of Appeals, following this Court's *Pioneer* test, has previously held that "the fault in delay remains a very important factor – *perhaps the most important single factor* – in determining whether neglect is excusable." *City of Chanute*, 31 F.3d at 1046 (emphasis added).

The District Court was well aware of all the issues raised by counsel for Petitioners and addressed each factual allegation in its holding. The District Court was correct in finding that counsel's illness was not so physically and mentally disabling that counsel was unable to file the appeal or communicate with co-counsel. Pet. App. at 11a; *Active Glass Corp. v. Architectural and Ornamental Iron Workers Local Union 580*, 899 F. Supp. 1228, 1231 (S.D.N.Y. 1995); *J.P. Fyfe, Inc. of Florida, v. Bradco Supply Corp.*, 96 B.R. 479, 483-484 (D.N.J. 1989); *In re A.H. Robins Company, Inc.*, 219 B.R. 153 (E.D. Va. 1998).

As the Tenth Circuit noted, counsel's failure to file a mere notice of appeal was belied by his apparent ability to perform various duties related to his extensive pro bono practice. Pet. App. at 4a. In addition, the accident from which counsel was recovering during the thirty-day period following the decision of the District Court had occurred *more than six months* before the notice of appeal was due. Pet. App. at 8a. The Tenth Circuit Court concluded that counsel was not so physically or mentally disabled that he was unable to file a notice of appeal. Pet. App. at 4a. Since such a finding is factual, rather than legal, it is not one of the kind that this Court is inclined to unsettle. *Pioneer*, 507 U.S. at 397, *citing Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). In addition, the District

Court considered the disruption of counsel's legal practice and was correct in holding that such claims should be given little weight in assessing the excusability of counsel's delay. This Court in *Pioneer* specifically held the very same thing:

> In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases.

Pioneer, 507 U.S. at 398; *see also Pedereaux v. Doe*, 767 F.2d 50, 52 (3rd Cir. 1985) (approving district court ruling that fact "that counsel spent much of the latter period of time preparing for the trial of other matters does not excuse the failure to attend to the insubstantial task of filing a notice of appeal").

Unlike the unconventional limitation date described in the *Pioneer* case, the time limit for filing a notice of appeal in this case was clear – it was the standard thirty days described in FED. R. APP. P. 4(a). The circumstances surrounding the neglect at issue in *Pioneer* were held excusable precisely because the form of the notice of the bar date at issue in that case was unusual: such notices ordinarily are prominently announced and accompanied by an explanation of their significance. *Pioneer*, 507 U.S. at 398-399. In stark contrast, however, orders dismissing cases such as in the case at bar, ordinarily are not accompanied by an explanation of their significance. Therefore, in the instant case, Petitioners have failed to prove the

circumstances surrounding their late filing were unusual, and therefore have failed to prove that the delay was excusable as the circumstances in *Pioneer* were.

Further, Petitioners' counsel admitted in his affidavit filed with the District Court that his failure to meet the deadline was partially due to the fact that he is unaccustomed to a thirty-day deadline. Despite counsel's lack of dealing with the usual deadlines in the District Court for the District of Wyoming, as the District Court correctly observed, failure to understand such procedural rules does not rise to the level of "excusable neglect." *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998).

Because counsel was physically and mentally able to file a notice of appeal, that he also had commitments to other cases, difficulties securing competent secretarial service, and had withdrawn from his former law firm, all fail to excuse his neglect. After all, a notice of appeal requires merely caption, signature block, and a *single sentence of text*. *See* Form 1 in the Appendix of Forms to the Federal Rules of Appellate Procedure. Petitioners failed to prove that their counsel's neglect was any thing other than "garden-variety" attorney inattention. They therefore did not meet their burden of showing that their counsel's neglect was excusable. *Lowry*, 211 F.3d at 464.

The District Court also considered all of the other factors described in Petitioners' Writ, including counsel's assertion of difficulty communicating with clients. *See* Pet. App. at 8a, 11a-12a. The District Court's holding is correctly based on the fact that other urgent business situations which cause plaintiffs to fail to authorize their

counsel to file an appeal do not rise to the level of excusable neglect. *Allied Steel*, 909 F.2d at 141-143. Petitioners chose to make themselves unavailable by taking treks into the wild. If parties could avoid the deadline for filing notices of appeal simply by voluntarily electing to make themselves unavailable, that deadline would no longer be a requirement of law.

In total, the Petitioners failed to prove that unique nor exceptional circumstances warranted the conclusion that their neglect to timely file a notice of appeal was excusable. Each of the circumstances that Petitioners relied upon are altogether ordinary, rather than unique or exceptional. Counsel is hardly the only or first lawyer with commitments to other cases, difficulties securing competent secretarial service, withdrawal from his former law firm, communication problems with clients who have chosen to make themselves unavailable, and the need for physical therapy. Indeed, many, if not most, lawyers experience these or similar challenges during some or many phases of their careers.

Petitioners argue, however, that counsel's circumstances were unique and exceptional *in the aggregate*. But some of these circumstances are inconsistent with others, i.e., compare counsel's claimed inability to represent Petitioners with his ability to represent his pro bono clients. The fact that the reasons for missing the deadline appear inconsistent and shifting suggests that the party making those excuses might not be acting in good faith. *Lowry*, 211 F.3d at 463. In any event, this Court has already rejected the suggestion that the fact that counsel was experiencing *upheaval* in his law practice at the time of the

deadline in question was not entitled to great weight. *Pioneer*, 507 U.S. at 398.

At all events, almost any party to any dispute could argue truthfully that unique or extraordinary circumstances had distracted its attention. *Allied Steel*, 909 F.2d at 143. Thus, if the mere fact that the circumstances relating to neglect were unique or extraordinary were sufficient to excuse the neglect, district courts would have no principled means of distinguishing circumstances that excuse neglect from circumstances that do not. *Allied Steel*, 909 F.2d at 143.

In sum, the circumstances surrounding the neglect in filing a timely notice of appeal here are neither unique nor exceptional. Those circumstances are therefore insufficient to excuse that neglect. *Quebecor*, 270 F.3d at 6-8; *Pontarelli*, 930 F.2d at 111; *Parke-Chapley*, 865 F.2d at 911; *Champion*, 680 F.2d at 1301; *Maryland Casualty*, 382 F.2d at 17. Accordingly, the District Court did not err in declining to grant Petitioners' motion to file a late notice of appeal. FED. R. APP. P. 4(a)(5)(A)(i).

The Tenth Circuit Court of Appeals correctly reviewed the District Court's determination of the presence or absence of excusable neglect based on an abuse of discretion standard. Although the Circuit Court only specifically mentioned a few of Petitioners' complaints in the Order, the Court had the entire record of proceedings before it. Simply because a court does not state each individual fact supporting its decision, such omissions are not indicative of a failure to consider those facts. In fact, the Court of Appeals plainly averred to review of the entire record by holding "[b]ased on the record before us,

we find nothing to suggest that the district court abused its discretion." Pet. App. at 3a-4a.

Both the District Court and the Court of Appeals applied the four part test for discerning "excusable neglect" described in *Pioneer*. The District Court applied all the facts provided by Petitioners to the test and still held that Petitioners had not met the excusable neglect standard described in *Pioneer*. The Tenth Circuit Court of Appeals reviewed the entire record and still found that the District Court did not abuse its discretion in holding that Petitioners had not met the excusable neglect standard in *Pioneer*. Despite Petitioners' dissatisfaction with those holdings, the fact that the District Court and Tenth Circuit Court of Appeals did not find that their late filing was the result of excusable neglect was not a misapplication of this Court's case law. Rather, the District Court and Tenth Circuit Court of Appeals correctly applied the facts of this case to the law set forth in *Pioneer*, and correctly held that Petitioners had not met the standard.

B. The District Court and Court of Appeals Decisions Did Not Conflict with Those of Other Courts of Appeals.

Petitioners suggest that the decisions of the District Court and Tenth Circuit Court of Appeals in this case are in conflict with the decision of the Fifth Circuit Court of Appeals in *United States v. Clark*, 193 F.3d 845 (5th Cir. 1999). In *Clark*, the defendant claimed to have demonstrated "excusable neglect" in filing late because his attorney failed to file when he asked the attorney to do so. *Id.* at 847. The defendant's counsel neither filed the

appeal as requested, nor withdrew from the case. *Id.* Based on those facts, the Fifth Circuit held that the defendant received ineffective assistance of counsel and the appeal was therefore filed late due to excusable neglect. *Id.* But, the Fifth Circuit Court expressly distinguished the facts in *Clark* from those in other cases where the attorney merely misunderstood the law by stating "in situations like the instant case, we are not faced with the fear that allowing excusable neglect based on an attorney mistake would lead to 'almost every appellant's lawyer . . . plead[ing] his own inability to understand the law when he fails to comply with a deadline.' " *Id. (citing Halicki v. Louisiana Casino Cruises,* 151 F.3d 465, 470 (5th Cir. 1998)).

In the case now before this Court, Petitioners do not contend that they requested their counsel to file and that he otherwise failed to do so. Rather, Petitioners' counsel offers a myriad of excuses as to why he failed to file a notice of appeal in a timely manner, all of which were considered by the District Court. Thus, the facts of this case are distinguished from those at issue in *Clark* on the very same basis that the Fifth Circuit in *Clark* itself distinguished the facts at issue from other cases. The factual background of both cases being different, it is no surprise that application of a "flexible standard" set forth in *Pioneer* would result in different outcomes. *See Pioneer,* 507 U.S. at 388-389 (describing a "flexible" standard).

Petitioners also cite *Kyle v. Campbell Soup Company,* 28 F.3d 928 (9th Cir. 1994), *cert. denied,* 513 U.S. 867 (1994), for the proposition that Circuit Courts of Appeals are in

disagreement as to whether mistakes of counsel constitute "excusable neglect." Pet. App. at 23. A simple reading of both cases makes clear that there is no conflict in application of the law to the facts. Rather, differing facts in the two cases resulted in differing conclusions. In *Kyle*, in clear contrast to *Clark*, the mistakes of counsel did not rise to the level of professional incompetence and were held not to be excusable. The Ninth Circuit Court of Appeals reviewed the facts, specifically that counsel misunderstood the deadline, and held that such a misunderstanding was not excusable neglect. In making that finding, the Ninth Circuit relied heavily on this Court's decision in *Pioneer*. *See Kyle*, 28 F.3d at 932. Despite Petitioners' claim that the *Kyle* opinion conflicts with *Pioneer*, this Court summarily denied Kyle's petition for writ of certiorari. *Kyle v. Campbell Soup Co.*, 513 U.S. 867 (1994).

The case before the Court on this Petition for a Writ of Certiorari is factually distinct from both cases cited by Petitioners as conflicting. Indeed, the cases cited by Petitioners as conflicting are also both factually distinct. However, there is an overriding theme common to all three cases: the application of the flexible standard for determining excusable neglect set forth in *Pioneer* to the differing factual scenarios. The correct legal standard was used in all cases, and there is no conflict among the circuits as to its proper application.

C. A Petition for Review Is Rarely Granted When the Asserted Error Consists of Erroneous Factual Findings or the Misapplication of a Properly Stated Rule of Law.

SUP. CT. R. 10 provides that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The District Court and the Tenth Circuit Court of Appeals both properly stated the factors for determining excusable neglect set forth by this Court in *Pioneer*. Petitioners merely claim that both Courts misapplied the facts to that rule of law, because Petitioners are unhappy with the result of that application. However, the jurisdiction of this Court should not be squandered merely to give a defeated party another hearing on the facts.

As was so succinctly stated by Chief Justice Taft, "[t]he jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Petitioners are unhappy with the opinions of the District Court and the Circuit Court of Appeals. The Petition for Writ of Certiorari before this Court is merely an attempt to rehear Petitioners' complaints and the Petition should therefore not be granted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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